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No. 92-6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARK R. BOLADO, Lance Corporal,
United States Marine Corps,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondent's Brief in Opposition to the Petition for Certiorari contends that two Courts of Military Review have considered the question presented by the petition. Brief in Opposition at 4 (citing *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam); *United States v Prive*, 35 M.J. 569 (C.G.C.M.R. 1992)). The Navy-Marine Corps Court of Military Review's *Coffman* decision, however, did *not* address the issue presented in the petition, which involves the method by which military appellate judges are appointed. Rather, *Coffman* con-

sidered the method by which military *trial* judges are appointed. The distinction between military trial and appellate judges is not without a difference. While military trial judges must be commissioned officers, 10 U.S.C. § 826(b) (1988), appellate judges need not be. 10 U.S.C. § 866(a) (1988). Because the *Coffman* court expressly relied upon the fact "that all military judges must be commissioned officers of the armed forces of the United States," 35 M.J. at 592, *Coffman* is inapplicable to the question presented in the petition. *See Prive*, 35 M.J. at 570 (distinguishing *Coffman* on the basis that *Prive* involved a challenge to both trial and appellate judges).

Because *Coffman* is inapposite, *Prive* is the only published case to address the issue presented.[1] *Prive*, however, is inconsistent with Supreme Court precedent. In *Prive*, the Coast Guard Court expressly held that Court of Military Review judges are officers, not mere employees, of the United States. *Prive*, 35 M.J. at 572-73. The Coast Guard Court, however, held that Congress was not bound by the Appointments Clause when exercising its Article I, Section 8, Clause 14 powers to regulate the land and naval forces. *Id.* at 576-77. This holding is inconsistent with this Court's directive that "[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). Thus, *Prive* was wrongly decided.

Respondent takes the position that because all of the Navy-Marine Corps Court's judges have been appointed by the President and confirmed by the Senate as military officers, the Appointments Clause is satisfied. Brief in

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[1] In one additional case, the Coast Guard Court of Military Review noted the issue, but declined to rule on it. *United States v. Claxton*, 34 M.J. 1112, 1113 (C.G.C.M.R. 1992).

Opposition at 4-9. This argument misses the whole point of the Appointments Clause. While the appellate judges in this case were appointed by the President *as military officers*, they were not appointed *as judges*. The Navy-Marine Corps Court's judges exercise their power because they are judges, not because they are military officers. For example, of the approximately 90,000 officers in the Navy and Marine Corps, only the nine members of the Court of Military Review can issue extraordinary writs. *See United States v. Dettinger*, 7 M.J. 216, 218-20 (C.M.A. 1978). The *independent* judicial authority which these judges possess is quite different from the structured, accountable authority which other military officers exercise.

Furthermore, experience belies any notion that promotion to a certain military rank satisfies the Appointments Clause. When Senators vote to confirm the promotion of Marine Corps officers to the grade of Colonel, *they are not even told* which officers are judge advocates, much less whether any particular officer has been designated for future service on the Court of Military Review. *See generally* 10 U.S.C. § 624(a)(1) (1988); *see, e.g.*, 138 Cong. Rec. S204 (daily ed. Jan. 3, 1992). Neither the President nor the Senate has any part in appointing particular military officers or civilians *to the office* of Court of Military Review judge. The individual who actually makes the appointment to that office is the Judge Advocate General, a constitutionally impermissible authority.

Respondent attempts to find support in *Shoemaker v. United States*, 147 U.S. 282 (1893). Brief in Opposition at 7-9. *Shoemaker*, however, is inapposite. Judge Lamberth emphasizes, "[T]he provision challenged in *Shoemaker* added certain duties to two *offices*; it did not confer additional responsibilities on any particular *officer*." *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of*

Thrift Supervision, 732 F. Supp. 1183, 1192 (D.D.C. 1990). *Shoemaker* is entirely irrelevant to the question of how military appellate judges are appointed because Congress did not provide that service as a judge is an additional duty of some other *office*. A Court of Military Review judgeship is not an appurtenance of another position. Rather, it is an office unto itself. Unlike the two military officers at issue in *Shoemaker*, Court of Military Review judges do not serve *ex officio*. Thus, *Shoemaker* provides no support for Respondent.

CONCLUSION

Because the petition presents an unresolved constitutional question which affects every case decided by the four Courts of Military Review, this Honorable Court should issue a writ of certiorari.

Respectfully submitted,

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